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SUPREME COURT, U. S.
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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 590, 591.

F. A. GILLESPIE AND SONS COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF OF AMICUS CURIAE.

W. A. SUTHERLAND,
Amicus Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The Undersigned respectfully moves this Honorable Court for leave to file the annexed brief as amicus curiae in the above entitled cause.

Respectfully submitted,

W. A. SUTHERLAND,
Amicus Curiae.

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BRIEF OF AMICUS CURIAE.

This brief is filed in support of the first ground of the petition for certiorari wherein petitioner suggests that this court should reconsider and overrule its decision in *Virginian Hotel Corporation* v. *Commissioner*, 319 U. S. 523, and should not require Congress by new legislation to reassert what should be clear from the present statute, that a taxpayer's basis is reduced by excessive depreciation erroneously claimed in prior years only when some tax benefit was derived from the erroneous deduction. Especially should this court not sanction an extension of the *Virginian Hotel* decision to tax such erroneous paper deductions as income in a later year.

The petition sufficiently sets out that the language of the statute does not support the result reached by this court in the *Virginian Hotel* case; that the word "allowed" does not

embrace the mere insertion in a return of an erroneous deduction which may never reach the attention of the Commissioner; and that the legislative history of Section 113 (b)(1)(B) clearly shows that the purpose of the section was not at all to bind a taxpayer by an erroneous deduction which in no way affected tax liability, but only to prevent a taxpayer from getting the benefit of an erroneous depreciation deduction and then restoring it to basis so as to get the deduction again.

The petition, however, omits any refrence to one most important fact, which respondent will not dispute: If Section 113 (b)(1)(B) is to be construed as binding the taxpayer by an erroneous depreciation deduction shown on a return in a prior year where no benefit to the taxpayer nor injury to the Government resulted from the deduction, it constitutes the sole instance in 33 years of income tax legislation, administration and litigation where any branch of the Government has ever intimated that an *admitted error* in a prior year which had no tax effect should be permitted to affect income in a subsequent year. The Government has never suggested any reason why Congress should have wished to make an exception in this situation to an otherwise universal rule. That no reason for any such exception exists is at least strongly persuasive of the fact that the statute should not be so construed.

Congress never intended to tax such erroneous deductions as income, and maybe could not do so. One or two simple examples should make too clear for need of elaboration the unsoundness of the decision in the *Virginian Hotel* case and its application in the present case.

A taxpayer is not entitled to deduct any depreciation on a residence which he owns and occupies. Stated otherwise, no depreciation on such a residence is "allowable." But if an ignorant taxpayer inserts on his return a deduction of $1,000.00 for depreciation on such a residence, and if the return shows a loss even without such deduction, and if (as is generally the case with such returns) the Commissioner

does not check the return and it remains uncorrected, the taxpayer under the *Virginian Hotel* doctrine will be taxable on an income of $1,000.00 if the residence is sold at cost. No one will seriously suggest Congress intended this.

Take the case of a taxpayer who, by mathematical error in his depreciation computations or even by an error in transposing depreciation figures from his work papers to the return, shows on his return a deduction for depreciation in excess of the correct depreciation which he intended to claim. Unless the Commissioner discovers and corrects this erroneous deduction prior to the expiration of the limitations period, it will decrease the basis of the property and increase income in future years, although the erroneous insertion of the deduction on the return did not benefit the taxpayer nor prejudice the Government.

Thus it will be seen that the *Virginian Hotel* decision makes a mockery of the principle so often announced by this court, the principle that taxation is a practical matter dependent upon actualities and not upon erroneous entries in books or on returns. The decision should be reconsidered in the light of its application by the courts below and overruled or at least held to have been extended to a length this court did not foresee. The desirability of such action is especially apparent in view of the fact that in the case of *Dobson* v. *Commissioner*, 320 U. S. 489 (1943), decided since the *Virginian Hotel* case, this court has disapproved the decision of the fourth circuit in *Helvering* v. *State-Planters and Trust Co.*, 130 F. (2d) 44, which was the only authority referred to by this court in its *Virginian Hotel* opinion in support of its interpretation of the word "allowed".

Respectfully submitted,

W. A. Sutherland,
Amicus Curiae.

October, 1946.